27 February 1954

MEMORANDUM FOR: The Director of Central Intelligence

SUBJECT: Appearances of CIA Employees Before Congress.

1. The problem of appearance by CIA employees before Congressional Committees was recognized in the early days of the formation and development of the Central Intelligence Group. Some studies of the matter had begun in OSS, and a series of memoranda on the legal and policy considerations were prepared beginning in 1946.

2. On the legal side the most comprehensive statement of the basic legal situation is contained in an opinion written in 1941 by the then Attorney General, Robert H. Jackson, to Chairman Vinson of the House Naval Affairs Committee. Mr. Jackson rehearsed the history of relations between the Executive and Legislative Branches of the Government from the time of President Washington on. His conclusion is that release to the Congress of confidential information in the possession of the Executive Branch relating to matters within the jurisdiction of that Branch would not be in the public interest. Our internal studies apply the Jackson theory to the particular problems of an intelligence service. These arise not only from the confidential nature of much intelligence material, but also from the relation of intelligence to the conduct of foreign affairs which is recognized as being in the exclusive jurisdiction of the Executive Branch. This particular relationship has been emphasized by the Supreme Court on several occasions, particularly in the case of Chicago & Southern Airlines v. Waterman Steamship Corporation, 333 U. S. 103 (1948). The Court stated in part:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

The Court cited with approval the case of U. S. v. Curtiss-Wright Export Corporation, 299 U. S. 304 (1936). Referring to the exclusive jurisdiction of the Executive in the area of intercourse with foreign nations, the Court stated:

> "Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. . . . Moreover, he, not Congress, has the better opportunity of

knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, . . ."

3. So far as they go, these legal arguments are restricted to the release of confidential information or of files pertaining to such information. They do not establish a basis for denying the appearance of witnesses requested by the Congress. Historically, such denial has been a matter of policy rather than law on the few cases where it has occurred. There are a few instances where the heads of Departments ordered witnesses subpoenaed by Congressional Committees not to appear, and issue has never finally been joined on this point. We have never taken the position that the subpoena powers of the Committees were limited, but in view of the policy background of certain cases and in view of the fact that almost any information required by a Committee about CIA would contain classified information, it was believed appropriate to require any employee called as a witness to obtain prior written permission from the Director.

25X1A 4. An Administrative Instruction to this effect was issued on 4 February 1948. This was repeated in CIA Regulation [redacted] in November 1950, which was re-issued in its present from as CIA Regulation [redacted] 25X1A in May of 1951.

5. Additional support to this policy adopted by CIA is found in National Security Council Intelligence Directive No. 11. The history of this Directive indicates that it recognized a need for policy guidance from the National Security Council to assist the Director in his responsibility for protection of intelligence sources and methods, particularly in regard to inquiries from the Congress.

6. A special restriction on release of information to the Congress applicable to the entire Executive Branch was set forth in a memorandum from President Truman, dated 13 March 1948. This provided that any inquiries from outside the Executive Branch of any nature for information, reports or files of employees relating to loyalty shall be referred to the office of the President for such response as the President may determine. This Directive is still valid according to our informants in the Department of Justice.

7. In addition to the foregoing, we have been of the opinion that the very demand or subpoena of an intelligence officer may in itself be against the national interest and that the subpoena power, although not

denied, should not in such cases be exercised. This position in one form was asserted in the Seattle criminal trial of the Contact informant, [redacted] with inconclusive results. The Court recognized merit in the argument, but was unwilling as a court of first instance to rule on such an important issue. The same position, basically, was taken in connection with the [redacted] case. Again, it is not possible to say that a doctrine was established, but it is believed that the argument received rather widespread support.

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8. In the light of what is set forth above, it is our opinion that the CIA Regulation requiring authority of the Director prior to responding to a demand from a Congressional Committee is well founded.

Signed

Lawrence R. Houston
General Counsel

OGC:LRH/blc
Orig. - Addressee
OGC